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Supreme Court, U.S.
FILED

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No. _____

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

James V. Marcanti -- PETITIONER

VS.

Illinois Attorney Registration & Disciplinary Commission
RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO

THE SUPREME COURT OF ILLINOIS

PETITION FOR WRIT OF CERTIORARI

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The Review Board of the Disciplinary Commission affirmed the Hearing Board decision to allow testimony as to serious uncharged acts of claimed misconduct neither included nor reasonably encompassed within the charging complaint. There is no dispute that this holding conflicts with an Illinois Court Commission decision (In Re Heiple) decided a few months before this matter was presented to the Review Board. Respondent asserts that admission of this testimony violated long standing and well established principles of procedural due process and that this holding is in conflict with this Court's decision in In Re Ruffalo, (1968) 390 U.S. 544, which required that a respondent in a disciplinary hearing must be provided notice of all of claimed acts of misconduct against which he must defend. Respondent asserts that this violation was especially egregious and warrants grant of certiorari as the Administrator, besides withholding notice of the alleged act, also withheld evidence indicating petitioner did not commit this uncharged act, and petitioner has submitted to the Review Board the affidavit of a witness, and other material, indicating no such act was committed, and, had he known of the claimed act could have offered substantial rebuttal evidence.

Besides withholding notice of serious claimed acts of misconduct, testimony of which was introduced at the hearing, and withholding a document which tended to show petitioner did not commit this act, the Administrator failed timely to disclose an intent to present an expert witness and refused ever to disclose the professional opinions of this witness, whose testimony was considered in determining the recommended discipline. In addition, petitioner submitted to the Review Board and the Illinois Supreme Court a statement under oath, and other material, regarding the Administrator's threats of intimidation calculated to compel petitioner into withdrawing a witness. The Review Board found this issue was waived and that it would not address the matter as the board could not determine the validity of the claim. Petitioner contends that sufficient evidence was presented to the Review Board at least to have remanded to the Hearing Board to conduct an inquiry. Too, petitioner asserts that intimidation is such disgraceful, outrageous conduct that it cannot be sanctioned or ignored by a court of justice and that judicial integrity demands it be reviewed. Petitioner contends that these intentional and prejudicial acts reduced the hearing to a sham and deprived petitioner of procedural due process.

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OPINIONS BELOW

The opinion of the Hearing Board and the opinion of the Review Board of the Disciplinary Commission which were the subjects of the Request for Leave to File Exceptions with the Illinois Supreme Court are included as Attachments 1 and 2 respectively in the Appendix.

JURISDICTION

The judgment of the Illinois Supreme Court denying petitioner's Request For Leave to File Exceptions was entered on January 26, 1998. A Petition for Reconsideration was timely filed and denied on March 12, 1998. (This is included as Attachment 3 within the Appendix.) This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1257(3).

CONSTITUTIONAL PROVISION

Amendment XIV of the United States Constitution-Section 1. All persons born or naturalized in the United states and subject to the jurisdiction thereof, are citizens of the United states and of the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.

STATEMENT OF THE CASE

In January 1996, the Illinois Attorney Registration and Disciplinary Commission filed a one count complaint against petitioner. (C 6) The complaint charged that petitioner violated the attorney rules of conduct by being arrested and subsequently pleading guilty to two class B criminal misdemeanors: solicitation and judicial impersonation. No factual allegations were contained in this complaint with respect to the solicitation charge. With respect to judicial impersonation, the compliant alleged petitioner made a pre-arrest statement that he was a judge and that subsequent to arrest judicial identification was found in his wallet. Petitioner filed an Answer admitting all allegations within the complaint except for one allegation contained in one part of one paragraph of the compliant: that is, petitioner denied ever making any pre-arrest comment that he was a judicial officer. (C.9)

Petitioner's attorney withdrew from this matter early in the discovery. As petitioner was without funds to retain another counsel, he proceeded to defend himself.

Petitioner mailed interrogatories and filled a request for production of records (C 86), and a request to admit (C 82). The production request asked, in part, for any witness statements. In response, the Administrator provided no material The request to admit stated in a paragraph that there is no claim or allegation that respondent during this incident ever showed or displayed any type of identification tending to indicate he was a judicial officer. The Hearing Board chair affirmed the Administrator's objection to this request to admit on the ground that the Administrator's attorney had no personal knowledge on this subject. (C. 98 and 105) At the final pre-trial conference, petitioner inquired whether the Administrator had spoken with a psychiatrist whom the Administrator has asked Petitioner to meet. (R48) In response, the Administrator stated that the Hearing Board's chair did not need to be taken up with such conversation. (R48) On the afternoon before the hearing, the Administrator informed petitioner that she would present this doctor as an expert rebuttal witness and she refused to tell petitioner what were the opinions or conclusions of this expert.

Petitioner presented certain pre-trial motions. One was a motion to supplement the record with the evidence deposition of retired Justice Joseph F. Cunningham, which was denied. (R. 85) Another was a

motion to prohibit the Administrator from presenting the testimony of an expert whose opinions she had not disclosed and whose identity had been disclosed only the afternoon before the hearing. This also was denied as the chair found there is no legal duty to disclose an intent to present an expert rebuttal witness. (R. 99)

Prior to the final pre-trial conference, petitioner had also filed a motion seeking to prohibit testimony as to acts already admitted in the complaint, acts of claimed misconduct not alleged in the complaint, and other testimony neither relevant nor material to the sole disputed act. (C. 54) This motion was denied.

During opening statements, the Administrator asserted that petitioner should be disciplined because he embarrassed the Supreme Court. (R.109) Petitioner stated; "I accept full and total responsibility for all of my actions that night."(R.110)

The Administrator called four Cook County Sheriff's Officers and a member of the Administrative Office of the Illinois Courts in her case-in-chief.

Officer LaMontagna testified the she was a decoy in a reverse prostitution sting. (R.118) She identified the other officers with whom she worked as: Fisher, Dillion, Thedos, Liboy and Shaw. (R.121-122) Respondent approached her and immediately identified himself as a judicial officer, (R.123) and made a specific sexual reference and money offer. (R.126) Respondent was immediately arrested, and the officer told Officer Thedos: "the gentleman said he was a judge."(R.129) The witness made some notes at the time of the arrest, reviewed them immediately prior to the hearing, and stated her testimony is consistent with these notes. (R.129-130)[1] On cross-examination, the officer denied stating that petitioner asked her to walk him into a bar. (R.132)

Investigator Liboy testified that once detained the petitioner stated he was a judge and that he would like to speak with the supervisor. (R.136) The supervisor, Fisher, arrived and petitioner reached into his pocket and took out and handed Fisher some identification. (R.136) Fisher

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[1] Neither during this hearing nor the criminal matter was petitioner provided a copy of these notes, although appropriate written discovery requests were made at both.

looked at the identification and ordered petitioner be placed under arrest. (136-137) Liboy at that time handcuffed the petitioner. (R.140) Officer Thedos testified that he had no conversation with LaMontagna before petitioner was arrested. (R.146) The petitioner was immediately handcuffed and did not display any type of identification. (R. 147)

Fisher testified that he was sitting across the street and saw petitioner approach the officer. (R.156) Fisher was called to the scene and was informed that petitioner had identified himself as a judicial officer. Fisher approached the respondent, who produced a judicial identification without stating a word. (R.158-159) Fisher later learned that another identification card had been uncovered, but he did not know the circumstances surrounding its discovery. (R.160 and 167)

The Administrator introduced various exhibits including the judicial identification card, another identification card and a written statement prepared by Fisher.

The Administrator's last witness in her case-in chief was Nathan Maddox, an Assistant Director for the Court Services Division of the Administrative Office of the Illinois Courts. (R.171) Maddox testified that at one time petitioner headed the Judicial Education Division, but that division and the Legal Services Division had been merged into Court Services. (R.173) More than a year prior to the activities alleged in the Administrator's complaint, petitioner's title was reduced to associate director and he was denied a cost of living pay adjustment awarded to other employees. (R. 178) Petitioner was moved from judicial education to legal services. Maddox also testified that the entire Supreme Court participated in the decision to terminate petitioner from his position within the Administrative Office and that this decision was made on the Tuesday following the arrest. (R.181 and 189) Maddox further testified that on the Monday following this matter petitioner had called to report this matter. (R.182) Respondent told Maddox that when he was arrested respondent was with a friend and that the friend said something to a woman that caused them both to be arrested. Respondent also told Maddox that he had stated he was a judge and asked to be released. (R.185)

Petitioner's Case

Petitioner presented William M. Madden who testified that he is a Cook County Circuit Judge and formerly served as acting director and deputy

director of the Administrative Office of the Illinois Courts. (R. 195) Through their work together over many years at the Administrative Office, the witness had come to know petitioner's reputation for truth and honesty. The respondent was a competent lawyer who was truthful under all circumstances. (R.196) Judge James C. Murray testified that he had worked with petitioner on various committees. (R.202) The quality of petitioner's professional work was excellent. (R.202-203) Petitioner's reputation for honesty with the members of the committees was excellent. (R. 203-204) Nick Gabb testified that he and petitioner had worked with a scout troop for about six years. (R.210) Prior to the time of the incidents alleged in the Administrator's complaint, petitioner's reputation for truth and veracity with the parents and other adults involved in the scout troop was very good. (R.210) Following the matters alleged in the Administrator's complaint, the petitioner met with many of the families of the scouts to discuss this matter. The adults encouraged petitioner to renew his efforts with the troop. (R.211) Eventually, petitioner did so.

Among the activities he organized was a second mock trial, held at the Bridgeview courthouse, involving about twenty scouts in different roles. (R.211) As a result of meeting with the families and his efforts with the troop, petitioner's reputation at the time of the hearing for truth and veracity with the parents and other adults of the scout troop is again very good. (R.212) Petitioner testified that he graduated from law school with distinction, was vice-president of his class, a member of the moot court team, a member of Who's Who in American Universities and Colleges, and was awarded the Order of the Coif. (R.219) Subsequently, petitioner earned an additional degree in International Law. (R.219)

Petitioner had served as an Assistant State's Attorney, and subsequently worked in private practice doing insurance litigation work. He accepted a position at the AOIC at a salary less than he was making in private practice. (R.220)

Prior to the time of the matters alleged in the Administrator's complaint, the petitioner was very active in professional and volunteer organizations. He coached his sons in soccer, was a volunteer reader for blind students, and organized an annual Christmas food and clothes drive. (R.221-223) Respondent was most active with his two sons'

scout troop. He organized a moot court trial and worked on a number of badges. (R.222)

With the Chicago Bar Association, petitioner served as a Director and later an Officer with the Young Lawyers' Section. (R.224) He served as chair to three different committees(R.224-225) and was eventually elected to the Board of Managers of the Association. (R.225)

In March, 1993, petitioner joined Alcoholics Anonymous. (R.225) he attended regularly until, February, 1995. (R.225) A week prior to this accident respondent and his two sons were involved in a car accident. (R.227) In the middle of the week petitioner's younger son was placed in intensive care at Christ Hospital. (R.227-228)

On the morning of the incident the petitioner received news that was positive regarding a judicial appointment. (R.225) The combination of his son's illness and the appointment coming at the same time caused distress to petitioner. (R..230)

Respondent had had the identification cards for years. (R.230) He had kept them in an office drawer. There purpose was to visualize his goal of seeking a judicial position. (R.231)

On the night in question, petitioner rose from his bed, and for the first time since he had joined AA, left his home intending to drink. (R.232) He went to two bars where he had drank before and had a drink or two in each. (R.232)

Petitioner approached the undercover officer and asked her to walk him into a third bar. (R. 233) He was arrested and handcuffed. (R.234) An African-American officer searched petitioner and found the identification. (R.234) This officer asked petitioner if he was a judge and petitioner said yes, and asked to be let go. (R. 234) When petitioner was brought to the station, he admitted he was not a judge. (R.235) As he was leaving the station, petitioner voluntarily presented other identification to the investigator. (R.235)

Following this, a named Cook County judge appointed by this Supreme Court telephoned petitioner and stated that he, the judge, had used his influence to see that a Chicago paper carried a story on the matter. (R.239) Such an article appeared on the Tuesday paper, which was the day the Supreme Court fired petitioner from his position with the Administrative Office. (R.239) On the Monday following this matter, petitioner telephoned Maddox and told him that he was with a third

person when the activities took place and that the third person was responsible for the arrest. (R.236)

Petitioner had his first session with Dr. Mazepa at that time and he continued to meet with the doctor on a near weekly basis through January. (R.236) In October petitioner agreed not to contest the criminal charges in exchange for supervision. He stated that the courtroom had a number of people from the press and he did not want either his family or himself to go through more publicity.(R..237) Also In October, Dr. Mazepa referred petitioner to a psychiatrist, Dr. Egan. (R.237) Petitioner twice meet with this doctor and returned to Dr. Mazepa's care. (R.238) Petitioner met individually with the families of every scout member of his troop. in order to apologize for this matter and any hurt this caused the family. (R.238) In December, a representative group of scouting parents asked petitioner to re-join the troop. (R.238) Petitioner began again with the scouts in January, 1996. (R.238) Also that January, petitioner telephoned the judge who had stated he used his influence to see petitioner's arrest was carried in the Sneed article, and petitioner apologized to him for doing something that would so anger the judge that he would feel the need to take that kind of action. (R.242) In February, 1996, petitioner began employment in a non-attorney position with an insurance company. (R.242) Also in February, 1996, petitioner began to coach soccer to a group of physically and mentally challenged adults. (R.243) In June, petitioner's team won the gold medal at the Illinois Special Olympics. (R.243)

Petitioner immediately after the arrest began again with A A. He attends three to five meetings a week and served as chair to a Sunday evening step group. (R.244) Petitioner has voluntarily absented himself from the practice of law since the date of his arrest. (R.242)

On cross examination petitioner stated he has never been on medication for depression, and, in October, told the doctor he wanted no such medications. (R.266) Petitioner believed that based on his telephone call on the day of his arrest, he would be appointed to a judicial appointment. However, since it came at the same time as the car accident and his son's injury, he did not feel well about it. (R.279) Petitioner's son was in intensive care from the time he was transferred from the emergency room to the time he was released from the hospital.

(R.287) Petitioner did not state he was a judge prior to his arrest. (R.293) The Administrator introduced two letters wherein petitioner asked his employer for re- consideration of the decision to terminate him. (R.302-303)

On re-direct, petitioner explained that one of his favorite authors, C.S. Lewis, among others, had written about the positive effect of visualizing oneself reaching his or her goal and this is why he had the identifications. (R.312) Petitioner denied ever showing any type of identification to anyone at the time of the arrest. (R.314) Petitioner voluntarily turned over the second identification when it would have been easier to have just kept it. (R.314-315)

Dr. Mazepa testified that for twenty years he has been a clinical social worker in the practice of psychotherapy. (R.327) He is a board certified clinical social worker. For ten years, he was the director of family psychology at Michael Reese Hospital, and he has taught at the Pritzker School of Medicine. (R.328)The doctor has prepared six to ten reports to the ARDC. (R. 330) The doctor saw petitioner at approximately twenty five sessions beginning on July 18, 1995. Some of these were double sessions. (R.331) Respondent's Exhibit No.9 is the treatment summary prepared by the doctor. (R.331) The doctor determined that petitioner suffered a major depressive disorder and generalized anxiety disorder due to the arrest and other activities. (R.333) The doctor also determined that petitioner suffered from dysthmia, a mood disorder where there is chronic and pervasive sadness, and secondary alcohol abuse. These conditions preceded the night of the arrest. (R.335) The doctor concluded that the symptoms of depression and anxiety are worked through and his prognosis most favorable. (R.336) The doctor stated that when he first saw petitioner the patient was suicidal and incapable of functioning. However, through psychotherapy he was able to identify events which had contributed to the dysthmia. Petitioner was able to work through these events so they would not have an effect on his current life. (R.335-337) The doctor also testified that in his professional opinion there is a nexus between the dysthmia, alcohol abuse and the allegations in the Administrator's complaint. (R.338)

On cross-examination, the doctor agreed he made four diagnosis. (R.356) The first, major

depressive disorder, single episode and the second, generalized anxiety

disorder, were reactive to the events alleged in the complaint. (R.356) Neither is any longer applicable. (R.356) The dysthmia and alcohol abuse are an explanation for what occurred on the night of the arrest. (R.356) The diagnosis of dysthmia was not applicable at the time of the hearing. (R.366) The Administrator called Dr. Dale Loomis, who is board certified in psychiatry. (R.383) In his opinion, a social worker should not render a diagnosis under DSM-IV (R.390)

The doctor, at the request of the Administrator, saw petitioner for about one hour on July 3. (R.394) At the session, petitioner talked of his treatment with Dr. Mazepa and of his past alcohol abuse. (R.394) Dr. Loomis found that petitioner was within normal categories in mental state examinations. (R.395) Petitioner agreed to take a screening psychological test (an MMPI) (R.396), and all scores, including depression, fell within a normal range. (R.398-399) Based on this, the doctor concluded, as did Dr. Mazepa, that there was nothing to substantiate an active psychiatric diagnosis with the exception of past alcohol abuse. (R.399) The doctor also found a nexus between the allegations in the Administrator's complaint and the alcohol abuse. (R.402)

On cross examination the doctor explained that because the MMPI showed no major depressive order, it did not mean that such a disorder may not have existed at a prior time. (R.406) Because of this, the doctor could not make a determination whether petitioner suffered from dysthmia prior to the time the MMPI was taken. (R.407) The doctor did, from the history, determine respondent suffered from alcohol abuse prior to the night in question. (R.407) The dysthmia and alcohol abuse were factors in what occurred on the night in question. (R.408) The doctor found no information that warranted the making of a psychiatric diagnosis. (R.409) The doctor told the Administrator of his conclusions. (R.412) Within the last several weeks, he was informed that he would testify at this hearing. (R.412)

On re-direct, the doctor indicated that he probably expressed his conclusions to the Administrator on August 7 (over a month prior to the hearing). (R.415) The Administrator's attorney admitted telling the doctor not to prepare any written material.(R.99)

In closing argument, the Administrator repeatedly argued that petitioner should be disciplined because he was an employee of the

Supreme Court. (R.425,427,432,and 441)
Petitioner apologized and accepted full responsibility for his actions. (R.441 and 442)
On rebuttal closing, the Administrator argued that the petitioner's reference to two court commission opinions should be considered in further aggravation. (R.449)
The Hearing Board submitted a report and recommendation of a three year and until further order of court suspension. (Attachment 1)
A majority of the Review Board approved the report and recommended discipline of the Hearing Board. (Attachment 2) Petitioner had provided the Review Board with a statement of an African-American Cook County Officer and minister at the scene of petitioner's arrest tending to show that the officers' testimony at the hearing as to the uncharged act of displaying identification was false. The Review Board struck the officer's affidavit ruling petitioner should have presented this testimony at the hearing. The Review Board refused to allow petitioner to file a petition for reconsideration.
The Illinois Supreme Court denied petitioner's Request for Leave to File Exceptions and subsequently denied petitioner's motion to re-consider the denial of the petition. The Court also denied petitioner's motion seeking that the Illinois Supreme Court order the ARDC to investigate the intimidation issue.

ARGUMENT

I

IT WAS A CLEAR AND EGREGIOUS VIOLATION OF ESTABLISHED PRINCIPLES OF PROCEDURAL DUE PROCESS AND WELL SETTLED CASE LAW FOR THE ADMINISTRATOR TO CONCEAL NOTICE OF THE MOST SERIOUS ACTIONS SHE INTENDED TO CHARGE PETITIONER WITH HAVING COMMITTED. THIS IS ESPECIALLY SO AS THE ADMINISTRATOR ALSO IMPROPERLY WITHHELD EVIDENCE SHOWING PETITIONER DID NOT COMMIT THESE ACTS AND AS PETITIONER HAS PRESENTED ON REVIEW THE STATEMENT OF AN WITNESS SHOWING THAT, HAD PETITIONER KNOWN OF THE UNCLAIMED ACTS, HE COULD HAVE OFFERED SUBSTANTIAL REBUTTAL TESTIMONY.

Petitioner contends that it was incumbent upon the Administrator to have disclosed within her charging complaint all alleged acts of misconduct about which she intended to offer testimony at hearing. In response, the Administrator has claimed she is not required to identify all acts which she intends to present. Here, the charging complaint, which was never amended, alleged Petitioner violated the rules of attorney conduct by carrying judicial identification within his wallet. Petitioner's Answer admitted he carried this identification. At the hearing, the Administrator presented no testimony about identification being found in Petitioner's wallet.

Rather, some officers testified that Petitioner asked that the commanding officer come to the scene of the arrest (another allegation not alleged in the complaint), and that Petitioner took judicial identification from his wallet and displayed it to the commander. Neither the Administrator's charging complaint, the misdemeanor criminal complaint nor any statements or other discovery provided in the criminal matter or the disciplinary matter ever stated, suggested or implied that such conduct was committed. To the contrary, the criminal misdemeanor complaint of impersonation charged that petitioner committed this offense by carrying identification concealed within his wallet. No claim was ever made that petitioner displayed identification. The Review Board in dismissing petitioner's argument stated:

"The Administrator argues that she is not required to plead every fact she intends to introduce into evidence.[2] We find the complaint in this matter informed (petitioner) that his conduct (on the night of the arrest) was the basis for the assertion of professional misconduct. This is not a situation where completely irrelevant misconduct, such as conversion of funds or neglect of client matters, surfaced during the hearing and entered into the Hearing Board's findings.[3] The testimony related to the events which gave rise to (petitioner's) arrest and guilty plea, were adequately set forth in the complaint." (Rev Br. p. 9 and 10) (emphasis added)

In contrast to this statement that a charging complaint needs only to provide a general statement as to some conduct which must be defended, the Court Commission in Heiple, supra, and this Supreme Court have steadfastly and unequivocally found that due process in a disciplinary setting mandates that the respondent must be given notice of the alleged acts against which he must defend.

The decision of the Review Board is in direct and complete conflict with this Court's holding in In Re Ruffalo, 390 U.S. 544(1968), as well as the holding in Heiple, supra. In Ruffalo, an attorney in a disciplinary hearing was charged with employing a third party to solicit clients. At hearing, testimony was offered that the third party did not solicit clients for the attorney, but that the third party did investigate FELA cases for the attorney. Following this testimony, the charges were amended to include retaining the third party to investigate charges against his employer. The disciplinary board found the attorney in violation of two charges, one of which was the amended charge of retention for investigation. In reversing this decision, a unanimous Supreme Court, stated:

"Disbarment, designed to protect the public, is a punishment or penalty imposed on a lawyer. (citations omitted)...He is accordingly entitled to procedural due process, which includes fair notice of the

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[2] The Illinois Court Commission rejected this specific assertion in In Re Heiple, 97cc1. There the omission stated: "The JIB was required to set forth (within the charging complaint) all of the facts it believed were necessary to sustain its claim."

[3] In making this statement the Review Board must have overlooked the testimony of Nathan Maddox as none of his testimony was relevant to the allegations within the complaint.

charge. (citations omitted)... These are adversary proceedings of a quasi-criminal nature... The charge must be known before the proceedings commence...The absence of fair notice as to the reach of the grievance procedure and the precise nature of the charges deprived petitioner of procedural due process." 390 US 550-552. (emphasis added)

Rule 753(b) of the Rules on Admission and Discipline (hereafter Rules of ARDC) provides in part "...The complaint shall reasonably inform the attorney of the acts of misconduct he is alleged to have committed." (emphasis added) Rule 3 of the Court Commission under which Heiple, supra, was decided has a similar pleading requirement. Our Illinois Supreme Court has repeatedly commented on the notice requirements under this rule and found that an attorney may not generally be disciplined for conduct with which he is charged. In Re Harris, 93 III.2d 285 (1982); In Re Beatty, 118 III.2d 489 (1987); and In Re Gerard, 132 III. 2d 507 (1989). The Review Board's finding would have more credence if the testimony presented by the Administrator was at least consistent with the charges and allegations developed in the criminal proceeding, but clearly they are not. The testimony that petitioner asked that a commander be brought to the scene of the arrest and that petitioner took identification from his wallet and displayed it to the officer in order to show he, petitioner, was a judge is very serious action not alleged in the criminal complaint, the Administrator's complaint or in any discovery presented in either matter. There was no way petitioner could reasonable anticipate he would be required to present a defense to this serious charge. Such conduct by the Administrator clearly violated principles of fundamental fairness and procedural due process. However, there is much more here to warrant the grant of this petition, as statements by the Administrator tend to show she intentionally withheld notice of this charge and it is undisputed that she wrongfully withheld requested discovery which showed petitioner did not commit these acts. Too, petitioner has submitted the results of polygraph tests further tending to show he did not commit these acts, and he has submitted the statement of a Cook County officer, who is also a minister, showing that he did not commit these uncharged acts. If petitioner had known of these alleged acts, he could have called this officer-minister to testify, and, if petitioner had

been provided with a copy of the statement, he could have examined the officer who authored it and testified contrary to it. The results of the polygraph tests further tend to show there was no reasonable way for petitioner to have anticipated this testimony of uncharged acts as the testimony is false.

Withholding of Notice of Charge

During discovery, petitioner filed a request to admit and a request for production of documents. The request to admit (C.82) stated in a paragraph that there is no claim or allegation that the petitioner during this incident ever showed or displayed any type of identification tending to indicate that he was a judicial officer. (C. 82-83) The chair affirmed the Administrator's objection to the request to admit on the ground the Administrator had no personal knowledge on this subject. (C. 98 and 105) The Administrator in argument on this motion stated "I know who the witnesses are, who have knowledge one way or the other" (R. 52) The Administrator has never clarified this statement, however, it certainly now can be understood as meaning the Administrator knew of and intended to introduce testimony of this unclaimed act, but wished to conceal notice from the petitioner. If she intended to present this testimony, she was obligated to include these factual assertions in her charging complaint. Rather, she withheld such notice from petitioner and chose to "sandbag" him with it at the hearing.

Failure to Produce Required Discovery

Petitioner's production request asked, in part, for statements prepared by any witnesses and statements given by any witnesses. The Administrator stated she had none, except for material protected by the work product. (C.100) Administrator's Exhibit No.4 to the Hearing Board is a letter written by the Cook County officer who commanded the operation in which petitioner was arrested. It states identification was found in petitioner's wallet and it makes no mention that he, the commander, was called to, or even was at the scene of the arrest, and it does not state the petitioner displayed identification. This letter was prepared by the commander immediately after the arrest and 14 months prior to the hearing. There is no dispute that this letter was wrongly

withheld from production by the Administrator. Her explanation to the Review Board, that she did not realize this letter was discoverable, goes only to the willfulness of the failure. (Adm Br. to Rev Br.p. 18). It is a discoverable statement, and it is completely contrary to this witness's testimony. Although the Review Board states this letter has "minor discrepancies" (RevB.p.11) with the testimony of the witness; the letter is completely and fully inconsistent with the testimony of the witness. It is impossible for petitioner to have committed the uncharged acts claimed at the hearing if the events described in this letter took place. If this letter had been produced to petitioner, as the Administrator was required by law to do, petitioner could have presented it during the commander-author's cross examination and petitioner could have called the Hearing Board's attention to these blatant, deep inconsistencies. In its opinion, there is no indication that the Hearing Board ever recognized these inconsistencies.

Statement of Officer Jones

Petitioner submitted to the Review Board the statement of Officer Jones. In this statement, Attachment 4A, this African-American Cook County Officer [4] and minister, states that he was on assignment at the scene of petitioner's arrest and that to the best of his recollection, Commander Fisher's letter is correct. If so, petitioner did not display identification. Petitioner
offered this statement to show that, had petitioner been charged with this offense or been given any reasonable notice to expect such testimony, he could have called this officer to rebut it. The Review Board struck this affidavit saying this testimony should have been offered at the hearing. (Rev. B. 13) Petitioner's motion to reconsider in part pointing out that it is impossible to prepare rebuttal testimony to charges that are withheld from the complaint and which cannot reasonably be anticipated was ordered stricken without consideration.
Without objection by the Administrator, petitioner submitted the results of a polygraph test to the Illinois Supreme Court which tended to

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[4] None of the Cook County officers who testified could recall an African-American officer being present at the scene of the arrest.

verify that petitioner never displayed identification. (Attachment 4B) This result further shows there was no reason to anticipate such testimony, as the testimony was false.

Finally, petitioner points out that of about 80 pages of transcript as to what took place on the night of the arrest a line or so of it relates to the sole disputed factual issue. In Re Heiple, supra. supports petitioner's pre-trial argument that testimony should not have been admitted. For these reasons, petitioner respectfully asks that the United States Supreme Court grant this petition for a writ of certiorari.

II

THE CUMULATIVE EFFECT OF THE ADMINISTRATOR'S MISCONDUCT WAS TO REDUCE THIS HEARING TO A SHAM.

Petitioner assets in Argument I that the failure to include the charge of displaying identification in order to avoid arrest violated established principles of due process and is in conflict with this Court's decision in Ruffalo, supra. Petitioner here asserts that these, and other acts committed by the Administrator denied petitioner any semblance of a fair hearing.

In addition to the matters discussed in Argument I, Petitioner now complains of the Administrator's use of intimidation to compel him to withdraw a witness; her failure timely to disclose her intent to present expert testimony, and her improper withholding of the conclusions of this expert, especially since the Hearing Board and Review Board both demonstrated they misunderstood the testimony of this witness. Petitioner asserts that these acts had the cumulative effect of denying him anything close to due process and fundamental fairness.

A. Intimidation to Compel Respondent to Withdraw a Witness

Petitioner raised in his brief before the Review Board, and within his verified Response to the Petition for Interim Suspension, the Administrator's use of intimidation as a litigation tactic.

Also, petitioner filed a motion seeking that the Administrator be ordered to investigate this charge or that another party be appointed to investigate it. The Supreme Court denied this motions and a motion for

reconsideration.[5]

Over written motion and oral objection (R. 178), the Administrator elicited testimony that the Supreme Court fired petitioner from his position of ten years on the day the Sun-Times gossip column article appeared. (R.181) Petitioner testified that after this termination and the Court's refusal to allow him to file medical testimony and other material regarding the ADA, he did not work for months and eventually exhausted his pension benefits, his savings, and most of a home equity loan. Eventually, petitioner found employment in a non-attorney position. In March 1996, after his counsel withdrew, petitioner met with the Administrator's attorney, presented her with a letter and a package of affidavits of reputation witnesses, and informed her that he had just found employment. Petitioner inquired about the possibility of imposing discipline upon consent. The Administrator's response was to send a letter stating she intended immediately to contact petitioner's new employer. Attachment 4C. Petitioner called and asked that she not do so. The Administrator's attorney agreed if, and only if, petitioner would immediately write a letter withdrawing Justice Bilandic as a witness. Petitioner did so, and hand delivered this letter to the Administrator's office the next day. Attachment 4D. Before delivering this letter, petitioner sought advise from a number of people who, had the Administrator investigated, would have confirmed these discussions. The Administrator did keep her part of the unholy bargain and, although she wrote she would, never did contact petitioner's employer.

The Review Board found that this issue is waived, there was no basis for determining the accuracy of the claim, and that the testimony would not have impacted on the Hearing Board. (Rev R. p.17) Petitioner asserts that the Review Board overlooked undisputed evidence presented to show the accuracy of the assertions regarding the intimidation, and the board failed to consider petitioner's assertion that this issue is so fundamental that it cannot be waived. Petitioner has explained how this testimony would have influenced the Hearing

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[5] Illinois Supreme Court Rule 752 states in part that "the Administrator shall... at the instance of the aggrieved party investigate conduct of attorneys..."

Board, and notes that, neither before the Review Board nor the state Supreme Court, has the Administrator contested petitioner's statement that such action took place. Petitioner will gladly take a polygraph test regarding this.

As to the relevance of the justice's testimony, petitioner points out that he had testified to certain specific triggers which caused his lapse on the night of the arrest: his absence from meetings; his two lapses, which consisted of one drink each time; the car accident the week before; his son's injuries which required hospital attention in the intensive care unit;, and the news regarding a judicial appointment. Petitioner explained that positive news of the long sought appointment at the time of his son's serious injury, and the other matters, completely overwhelmed him. During her closing argument, the Administrator challenged petitioner's explanation of the activities that night and questioned his credibility:

> "...But he would have this panel believe that he received a phone call telling him he was going to be appointed a judge by the Supreme Court when his supervisors in a branch of the supreme court have just finished demoting him in title and position? I just don't think that's the way it works...." (R.427-428)

The Justice's testimony would have substantiated petitioner's testimony about receiving favorable news that week with respect to an appointment. Too, the Administrator's statement that petitioner was not testifying honestly (when she knew petitioner could not produce the witness for fear the Administrator would improperly use her influence to interfere with petitioner's employment) of course impacts the panel's decision regarding the recommended discipline.[6]

More importantly, petitioner asserts that intimidation is such offensive conduct that it cannot be sanctioned whether the witness involved is a factual or other type witness. If the Administrator felt that the justice's testimony was neither relevant nor material, she could have filled an

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[6] The Administrator also told the Hearing Board that she and petitioner had never discussed taking an evidence deposition of retired Justice Cunningham until a few days prior to the hearing and that petitioner's claim to the contrary was a false attack upon her credibility.(R80) Petitioner presented before the Review Board copy of a long prior letter discussing this evidence deposition.

appropriate motion seeking to bar him as a witness. Rather, she took the low road and threatened to use the strength of her office possibly to have petitioner fired from his job unless this witness was withdrawn. Petitioner had not worked for seven months prior to this and his entire savings, pension, and most of his home equity loan were exhausted. Faced with the choice of putting food on the table for his family or laying down on his defense, petitioner chose the protection of his family. Judicial integrity, public confidence and fundamental fairness demand that one having to defend himself against acts of claimed, and unclaimed, serious misconduct, and fighting for his legal career, should not have to make such a choice.

The Review Board Report states with respect to this matter

> "...the misconduct has to be evident from the record. Typical examples of misconduct include prejudicial statements made by an attorney during witness examination or closing argument... We have no basis for determining the accuracy of his version of the events." (Review Board Report P.17)

With due respect to this panel, Respondent believes the Review Board has misconstrued the type of intimidation used by the Administrator. There is a great distinction between the conduct described above by the Review Board; and the rank, vile, and improper action done by the Administrator's attorney. Her type of improper action is not carried out in a courtroom or reflected on a record. It is performed outside the light of public exposure, and trusts that fear will keep such wrongs from being exposed. Because such acts are not done in the open, it does not mean such acts, when subsequently exposed, should be condoned or ignored. Petitioner asserts that judicial integrity and public confidence within our entire legal system suffer a significant loss of esteem when the ARDC, whose sole purpose is to protect the public from unethical conduct, can be allowed to commit serious acts of intimidation and not have their conduct called into question as long as their actions were committed outside of the hearing room..

This holding by the Review Board sets a precedent that intimidation is appropriate, waived, or harmless, as long as it is done off the record. Petitioner urges that this should not be the law, and that this act, alone or with the others here listed, warrant this Court's grant of certiorari.

B. The Administrator's order to its expert not to prepare a report. failure timely to inform petitioner of her intent to call this expert. and refusal to disclose the opinions and conclusions of this witness, together with the other errors alleged, establish significant violations of procedural due process and violate rules of discovery and civil procedure which warrant the grant of certiorari. This is especially so as both the Hearing and Review Board opinions demonstrate that when recommending discipline neither understood the testimony of the Administrator's expert witness.

In June, 1996, petitioner agreed to be examined by a mental health expert selected by the Administrator. (R.20) This examination took place on July 3. (R.394) In July and August, the petitioner telephoned the Administrator inquiring about obtaining a copy of the expert's report. (C.118) Petitioner, in his request to produce, requested a copy of the expert's report. (C.88) The Administrator's response to this was "none." (C. 100) When, at the final pre- trial conference, petitioner began to inquire about Dr. Loomis, the Administrator replied; "I don't think we need to take up (the chair's) time with this, but yes I have (had discussions with him)." (R. 48) The Administrator never disclosed the subject of her discussions with the expert, his opinions or conclusions or her intent to have him testify.

A full week after the final pre-trial conference, and the Friday before this hearing, the Administrator filed an amended notice identifying the expert as a witness. This was mailed to the petitioner, who learned on the afternoon before the hearing that this expert would testify. (R. 90) At no time prior to the expert's testifying at the hearing was petitioner ever informed as to the opinions or conclusions to which this expert would testify. At the hearing, testimony established that the Administrator had known of the conclusions of this witness for over a month (R.41 5), and she had ordered her expert not to prepare any written material. (R.99-100) Under these circumstances, petitioner suggests it was clearly error for the chair to allow this expert to testify. Indeed, even in her brief before the Review Board, the Administrator did not suggest that the chair's stated reason for allowing this expert to testify, that there is no need to disclose the identity or conclusions of a rebuttal expert (R.95) was correct. There should be no dispute that the Administrator was required under the applicable rules of evidence to

have provided timely notice of her intent to call this witness and, equally important, she was required to disclose the opinions and conclusions of the expert so petitioner would have had an opportunity to seek expert review of the witness's conclusions. Under the circumstances in this matter, petitioner had absolutely no opportunity to prepare an effective cross examination of this expert or to test the expert conclusions of the witness.

In its Report the Review Board stated

> "We are reluctant to conclude that the Administrator, without being officially informed of (Respondent's) intent to call his own expert witness, was tardy in revealing the name of her rebuttal witness." (RB p.6)

Respondent points out that he fully complied with the purpose behind Rule 253 and the applicable Rules of Civil Practice and Rules of Evidence and provided timely and complete notice to the Administrator of his intent to call Dr. Mazepa. Too, petitioner complained not only of the failure to disclose that the witness would testify, but equally important, her refusal ever to disclose the opinions or conclusions of her expert. Months prior to the hearing, petitioner, in writing, informed the Administrator of his intent to call Dr. Mazepa at the hearing. Petitioner presented to the Administrator Dr. Mazepa's report and his address and telephone number. The Administrator wrote and telephone the doctor to discuss obtaining his complete file and to arrange for his deposition. Dr. Mazepa was deposed by the Administrator months prior to the hearing.

The Administrator never claimed doubt as to whether Dr. Mazepa would testify or surprise as to the subject matter of his testimony. She never attempted to justify her refusal to provide notice of her witness or her refusal to disclose his conclusions by claiming not to have been officially informed that Dr. Mazepa would testify. The only "official" failure petitioner made was not to have delivered a copy of his notice to the Clerk's office. In contrast to petitioner's full and complete and timely disclosures, the Administrator's attorney again took the low road and "sandbagged" petitioner making it impossible to prepare a defense to the doctor's testimony. This Review Board found no prejudice resulted from the testimony of the Administrator's mental health expert. (Rev. Br. p.16) First, petitioner reminds that he never

knew of the expert's conclusions until they were presented at the hearing so that their was no way to prepare a cross-examination. Second, petitioner notes that the recommended discipline was based in significant part on misconstrued and misunderstood testimony from this rebuttal expert. Petitioner presented to the Illinois Supreme Court and the Review Board the Affidavit of Dr. Mazepa explaining that the doctor, and Dr. Egan, could have refuted this expert's surprise testimony and that both board's misunderstood the testimony of this witness in addressing the issue of recommended discipline. (Attachment 4E).

Petitioner here asserts that it was prejudicial error and violated principles of due process for the Administrator to refuse to disclose her intent to present expert rebuttal testimony and it was additional error for her to refuse to present the conclusions or opinions of this expert. Further, the actions of the Administrator herein described, taken with the other actions presented in this Argument show a serious pattern of misconduct calculated to deprive petitioner of having any meaningful opportunity to present a defense in this matter.

It is undisputed that the Administrator's complaint failed to include the most serious act of claimed misconduct she offered at hearing (displaying identification). Under the principles discussed in Ruffalo and Heiple she was obligated to do so. It is also undisputed she wrongly withheld the written statement of the commander of the operation and that this statement is inconsistent with the officer's testimony on this serious uncharged act. Further, it is beyond dispute that she violated the applicable rules of discovery by failing to provide the opinions of her expert. Dr. Mazepa's affidavit shows the prejudice from this willful failure to disclose. In addition, Petitioner submitted a verified statement of an act of intimidation, Attachment 4F, made by the Administrator and has presented written material tending to verify that this act took place. This claimed act of serious misconduct has been dismissed by the Reviewing Board, ignored by the Illinois Supreme Court, and declared "baseless" without any investigation by the ARDC, which has a statutory duty to investigate such conduct.

Due process and fundamental fairness require that a respondent in a disciplinary matter must be informed of the claimed acts of misconduct he or she is charged with committing. Also, a respondent in such a

matter should be notified of the witnesses who will testify against him, and should be provided with the statements of these adverse witnesses and should be told of the conclusions of an expert witness who will testify. In addition, any respondent must be allowed an opportunity of providing a full and vigorous defense. Each and every one of these fundamental rights was violated by the Administrator during the course of this proceeding. Petitioner urges that the cumulative effect of these acts was to deny him any meaningful opportunity to defend himself and violated his rights and privileges granted under the due process clause of our national Constitution.

CONCLUSION

For the foregoing reasons petitioner respectfully requests that a writ of certiorari issue to the Supreme Court of Illinois so that its judgment may be reviewed and reversed.

Respectfully submitted,

James V. Marcanti
10345 S. Kilpatrick Ave.
Oak Lawn, IL, 60453
708-424-8059

APPENDIX

FORM NO. 1

State of Illinois
Supreme Court

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the twelfth day of January, 1998.

Present: Charles E. Freeman, Chief Justice
Justice Benjamin K. Miller — Justice Michael A. Bilandic
Justice James D. Heiple — Justice Moses W. Harrison II
Justice Mary Ann G. McMorrow — Justice John L. Nickels

On the 29th day of January, 1998, the Supreme Court entered the following judgment:

In re:

M.R.14249

James V. O'Shaughnessy-Marcanti
10345 S. Kilpatrick
Oak Lawn, IL 60453

Atty. Reg. & Disc. Comm.
96 CH 1

The petition by respondent James V. O'Shaughnessy-Marcanti for leave to file exceptions to the report and recommendation of the Review Board is denied. The report and recommendation of the Review Board is approved and confirmed, and respondent is suspended from the practice of law for three (3) years and until further order of Court.

Bilandic, J., took no part.

As the Clerk of the Supreme Court of the State of Illinois and keeper of the records, files and Seal thereof, I certify that the foregoing is a true copy of the final order entered in this case.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the Seal of said Court this 29th day of January, 1998.

Julieann Hornyak

Clerk
Supreme Court of the State of Illinois

BEFORE THE HEARING BOARD
OF THE
ILLINOIS ATTORNEY REGISTRATION
AND
DISCIPLINARY COMMISSION

In the Matter of:	)	
JAMES V. MARCANTI,	)	96 CH 001
Attorney-Respondent,	)	
No. 1758977	)	

REPORT AND RECOMMENDATION OF THE HEARING BOARD

The hearing in this matter was held on September 10, 1996 at the offices of the Attorney Registration and Disciplinary Commission 130 East Randolph Drive, Suite 1100, Chicago, Illinois. The Panel consisted of Michael Albert, Chair, Valerie C. Wells, lawyer member, and Dr. Harry Hardwick, public member. Wendy J. Muchman represented the Administrator. The Respondent represented himself, pro se.

THE COMPLAINT AND ANSWER

On January 2, 1996, the Administrator filed a one count Complaint pursuant to Supreme Court Rule 753(b). The Respondent answered the Complaint on January 25, 1996. The Complaint concerned Respondent's solicitation of a sexual act from an undercover police officer and his impersonation of a judge. This conduct allegedly violated Rules 8.4(a)(3); 8.4(a)(4); 8.4(a)(5); 8.4(a)(6) of the Illinois Rules of Professional Conduct and Supreme Court Rule 771. The Respondent admitted the essential allegations of the Complaint, but denied the allegations of misconduct.

THE EVIDENCE

The Administrator presented the testimony of Patricia La Montagna, Steve Liboy, John Thedos, David Fisher, Nathan Maddox and, on rebuttal, Dale Loomis. The Administrator's Exhibits 1, 2, 3, 5, 6 through 12 were admitted. The Respondent testified in his own behalf, and also presented the testimony of William Madden, James C. Murray, Nicholas Gabb and James P. Mazepa. The Respondent's dent's Exhibits 4, 8 and 9 were admitted.

FILED
JAN 17 1997
ATTY REG & DISC COMM
CHICAGO

A. The arrest of Respondent and resulting criminal charge

Cook County Sheriff's police officers LaMontagna, Leboy Thedos and Fisher all testified about the arrest of Respondent the night of July 14, 1995 on the sidewalk in the 1800 block of south Cicero Avenue in Cicero, Illinois. Officer LaMontagna was working undercover in connection with a sting operation to reduce prostitution in the area. Respondent approached her on foot, told her he liked what he saw and that he was a judge in the City of Chicago. He asked the officer to have sex with him all night and also to get him some drugs. When she replied that her source dried up, Respondent looked at his watch and said, "Well, it's too late for me to get him out of jail." Officer LaMontagna had never been solicited for sex by someone who had identified himself as a judge. Respondent's words were memorable. Respondent did not appear to be intoxicated, nor did his breath smell of alcohol. (Tr. 56, 62-66, 69).

Officer LaMontagna then signaled for backup assistance. Officer John Thedos, Sergeant Shaw, Investigator Steve Liboy, and

Lieutenant David Fisher participated in Respondent's arrest. Officer Thedos was the first backup officer on the scene. Respondent told Thedos that he was judge. Thedos handcuffed the Respondent. Respondent told Investigator Liboy, one of the arresting officers, that he was a judge and wanted to speak with a supervisor. Liboy radioed Lieutenant Fisher, who examined a piece of identification from Respondent's wallet. (Tr. 74, 75, 85). Fisher testified that the identification was a judicial identification card which bore the name Bernard R. Spak, a judge of the Circuit Court of Cook County. (Adm. Exhibit 2, Tr. 96).

At the Maybrook lockup, Fisher saw a second judicial identification cation card which bore the name James V. Marcanti, associate judge. (Adm. Exhibit 1, Tr. 98-100). According to Fisher, at no time during the arrest did Respondent appear to be intoxicated. (Tr. 101). Fisher communicated the events surrounding Respondent's arrest to the ARDC by letter on July 19, 1995. (Adm. Exhibit 4). Respondent was charged in case number 95 MC4 8823 with solicitation of a sexual act and also false impersonation of a government official, two Class B misdemeanors. He was represented by counsel in the criminal proceedings. On October 16, 1995, Respondent pleaded guilty to both

charges. Respondent was granted one year of supervision on the charges, ordered to perform 30 hours of community service, to receive psychological counseling and to attend Alcoholics Anonymous meetings. (Admn. Exhibits 5 and 6, Tr. 199).

At the disciplinary hearing, Respondent admitted that he should not have had the identification card of Bernard Spak in his possession, as processing that type of document was not within his job duties as an employee of the Administrative Office of the Illinois Court. Respondent testified that he doctored up his own identification card to show himself as an associate judge to gain a positive mental image. Respondent testified that he always kept these cards in his desk drawer at the office. (Tr. 210, 216). He testified that he had received a phone call from an unnamed aide of Congressman Lipinski on July 14, 1995, informing him that the Congressman had spoken to the Chief Justice about a judicial appointment for Respondent. Upon receiving this news, Respondent felt dejected. Respondent could not explain, however, why he took the Spak judicial identification card and his own doctored i.d. card out of his desk and put them in his wallet that day. Respondent admitted that his intent vas to try to talk his way out of the arrest by pretending he was a judge. (Tr. 167, 168, 172, 216, 218, 219).

B. The Respondent James V. Marcanti.

Respondent, James V. Marcanti, graduated from John Marshall Law School, with distinction, in 1976. He is married, and is the father of two boys, ages 13 and 17. He resides in Oak Lawn, Illinois, and has lived there with his family for the past five years. Respondent moved to Oak Lawn, Illinois, from Park Ridge, Illinois, because he wanted to be slated for a judgeship, and was promised political support if he lived in the southwest suburbs. (Tr. 157, 159, 160).

Respondent worked as an assistant State's Attorney for three years, then left and went into private practice, concentrating in insurance defense work. In 1986, Respondent accepted the position of staff attorney with the Administrative Office of Illinois Courts. His salary for 1985 was $106,000.00, his last year in private practice. At the AOIC, his beginning salary was $35,000. He accepted the position because he wanted to get back into public service and was sure that the position would be a good judicial training ground. (Tr. 158). At some point, Respondent changed his name on the role of attorneys to James

O'Shaughnessy Marcanti." "O'Shaughnessy" was his mother's maiden name. Respondent thought the name would have favorable ballot appeal. (Tr. 229, 230).

Respondent worked at the AOIC, moving up eventually to the position of assistant director and head of Judicial Branch Education. However Nathan Maddox, Respondent's former supervisor at AOIC, testified that in late 1993, Respondent was demoted to associate director of the Legal Services Division. Respondent was spending a lot of time trying to maneuver himself into a position to become a judge, and Respondent's assistant, Pat Rink was really carrying most of the load. Rink was promoted to assistant director of Judicial Education. (Tr. 114, 115, 158).

In October, 1993, a political activities policy went into effect which curtailed Respondent's ability to run for elective office while an ac-i.ve AOIC employee. Maddox testified that Respondent sought an exception to the policy, because he intended to run for judge. The policy did not restrict appointments to a judgeship, but it did restrict political activity. (Tr. 112, 113).

Respondent was a member of Alcoholics Anonymous from March, 1993 to February, 1995, because he was an alcoholic and vas using cocaine. (Tr. 164). He resumed going to AA meetings shortly after he was arrested. (Tr. 198). Attendance at AA meetings until October 14, 1996 was a condition of the supervision order in the criminal case. (Tr. 203).

Before his July, 1995 arrest, Respondent had been an active leader of the Boy Scouts, had been a volunteer reader to blind students through Blind Services, Inc., and helped organize food drives for the needy through an organization called Sons of Italy. (Tr. 160, 161). Respondent had also been an active member of the Chicago Bar Association, in positions ranging from Chair of the Appellate Law Committee of the Young Lawyers' Section to having served as a Trustee for a two year term on the Board of Managers. (Tr. 162, 163).

Respondent resigned from the AOIC effective August 31, 1995. His resignation letter ascribed his July 14, 1995 conduct to an "alcoholic lapse", caused by stress from a car accident about a week before his arrest in which his son had been injured. (Admn. Exhibit 8). Respondent accepted an offer of employment from an insurance

company in January, 1996, and began working there as a claims adjuster. (Tr. 180).

Respondent's social worker, James P. Mazepa, Ph.D., testified that Respondent suffered a single episode major depressive disorder and generalized anxiety disorder after his July 14, 1995 arrest.

The depression and anxiety had been worked through by March, 1996 when Mazepa wrote his report. Respondent's prognosis was most favorable. Mazepa also believed Respondent suffered from dysthmia a mood disorder characterized by sadness and low self-esteem, as well as alcohol abuse. These problems, however, did not cause his conduct on July 14, 1995, although they helped to explain it-. (Tr. 265, 271, 272, 276, 295, Respondent Exhibit 9).

The Administrator's rebuttal witness, Dale Loomis, M.D., a psychiatrist, also testified. Dr. Loomis did not believe that Mazepa vas qualified to render a psychiatric diagnosis of Respondent dent because a person who lacks medical training cannot distinguish between physical illness and mental disease. (Tr. 320, 328, 329). Loomis administered a mental status exam, and found Respondent to he within normal limits. He also administered the MMPI test, (Multiphasic Personality Inventory) a psychological screening test. The results fell within the range of normal variation, and the depression result was below average. Loomis did not believe that there vas anything to substantiate an actual psychiatric diagnosis in Respondent. Loomis disagreed with Mazepa in that Loomis did not believe either the diagnosis of a major depressive disorder or dysthymia were substantiated by any findings Loomis had. However, based upon Respondent's history, Loomis could make a diagnosis of substance abuse. (Tr. 333, 335-338, 340).

Respondent called three character witnesses to testify on his behalf, Judge William Madden, retired appellate court Justice James C. Murray, and Nicholas Gabb.

Judge Madden and Justice Murray were in agreement in their assessment of Respondent's reputation for truth, honesty and integrity within the legal community. The allegations of professional misconduct against Respondent, even if proven, did not-alter their opinion about him. Judge Madden stated that Respondent's reputation for truth and veracity did not necessarily fall simply because of one act

of desperate effort to avoid a career damaging circumstance. Justice Murray, however, assumed that Respondent must have been drinking the night he was arrested, because a judge should never let a police officer know he's a judge. To do so simply results in greater problems. (Tr. 134, 135, 136, 141, 142, 144, 146) . Nicholas Gabb a Boy Scout Scout Master and one of Respondent dent's close personal friends, knew Respondent through the Boy Scouts. He testified that Respondent had a very good reputation for truth and veracity. Respondent had stopped participating in the Boy Scouts after his arrest, but resumed his scout activities in January, 1996 after the parents encouraged him to become involved again. (Tr. 148-150, 151).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

We find that the Administrator proved by clear and convincing evidence each of the following charges of misconduct in Count I:

a. Respondent committed criminal acts by engaging in solicitation of a sexual act and impersonation of a government official in violation of Ch. 720, Section 5/11-14.1(a) and 5.32-5 ILCS that reflected adversely on the Respondent's honesty, trustworthiness or fitness as a lawyer in other respects in violation of Rule 8.4(a)(3) of the Illinois Rules of Professional Conduct;

b. Respondent engaged in conduct involving dishonesty, fraud, deceit or misrepresentation in violation of Rule 8.4(a)(4) of the Illinois Rules of Professional Conduct;

c. Respondent engaged in conduct prejudicial to the administration of justice in violation of Rule 8.4(a)(5) of the Illinois Rules of Professional Conduct;

d. Respondent stated or implied an ability to influence improperly any tribunal, legislative body, government agency or official in violation of Rule 8.4(a)(6) of the Illinois Rules of Professional Conduct;

e. Respondent engaged in conduct which tended to defeat the administration of justice or brought the courts or the legal profession into disrepute in violation of Supreme Court Rule 771.

RECOMMENDATION

Attorney disciplinary proceedings are intended to safeguard the public,

maintain the integrity of the legal profession, and protect the administration oi justice from reproach. In re Chandler, 161 Ill.2d 459, 641 N.E.2d 473, 479 (1994). In determining the appropriate discipline in a given case, we must consider the nature of the violation, as well as the circumstances surrounding the misconduct. In addition, "predictability and fairness require consistency in the sanctions imposed for similar acts of misconduct." In re Timpone, 157 Ill.2d, 178, 197, 623 N.E.2d 300, (1993). The case before us, however, is distinctive because it is so unlike other cases. There simply are no Hearing or Review Board reports or Illinois Supreme Court opinions involving an attorney who has impersonated a judge.

The Hearing Panel is aware that its recommendation in this case will set a precedent. Therefore, because The Review Board of the Attorney Registration and Disciplinary Commission or the Illinois Supreme Court may examine this Report and Recommendation, the Hearing Panel has striven to provide a well-reasoned analysis.

The Administrator argued that Respondent's misconduct warranted disbarment. The Hearing Panel declines to recommend that sanction, the most severe form of discipline. Instead, the Hearing Panel recommends that James V. Marcanti be suspended from the practice of law for a period of three years, and until further order of court. The "until further order of court" is warranted because Respondent should demonstrate that his alcohol and substance abuse problems have been addressed when he applies for reinstatement. Both experts, James P. Mazepa, Ph.D, and Dale Loomis, M.D., testified that Respondent had these problems.

The Administrator correctly argued that Respondent's misconduct duct is particularly serious because of the fact that it occurred when he vas employed as an assistant director of Legal Services at the Administrative Office of the Illinois Courts. The Supreme Court of Illinois has proscribed Rules of Professional Conduct. The Preamble states, in pertinent part,

> Lawyers therefore are responsible for the character, competence and integrity of the persons whom they assist in joining their profession; for assuring access to that system through the availability of competent legal counsel; for

> maintaining public confidence in the system of justice by acting competently and with loyalty to the best interests of their clients; by working to improve that system to meet the challenges of a rapidly changing society; and by defending the integrity of the judicial system against those who would corrupt, abuse or defraud it.

The last phrase is particularly important. By impersonating a judge, Respondent violated the integrity of the judicial system and he became one of those who corrupted, abused or defrauded it.

Respondent admitted that it was never within his job duties to retain the identification cards of former judges, yet when the card of former judge Spak came into his possession as early as 1991, he kept it, instead of forwarding it to the proper authorities. Respondent also testified that he altered his own AOIC identification card to show himself as an associate judge because he wanted to "visualize" what his name would look like if he were to become one. Respondent spent so much time maneuvering to become a judge he began to neglect his job, and instead delegated the work to his assistant, Ms. Rink. Respondent was eventually demoted in position at the AOIC from Assistant Director of Judicial Education to associate director of Legal Services.

Respondent left a lucrative practice as an insurance defense lawyer to work for the AOIC, at a far lower salary, in hopes that a position there would be a good training ground for a judgeship. Respondent moved his family from Park Ridge, IL to Oak Lawn, IL on a promise of political support to be slated for a judgeship. Respondent changed his middle name from "Vincent" to "O'Shaugnessey" his mother's maiden name, for ballot appeal.

Respondent's lack of judgment reached its zenith on the evening of July 14, 1995. Caught in illegal conduct, solicitation of a sexual act, Respondent tried to talk his way out of the arrest by pretending he was a judge. The Hearing Panel found the testimony of retired appellate court Justice Murray interesting on this point. Murray indicated that a judge should not identify himself as a judge; it only gets the judge into more trouble. Respondent's arrest and subsequent guilty plea on the solicitation of a sexual act charge, standing alone, would have warranted discipline from the Hearing Panel. However, Respondent s judicial impersonation made the charges far more serious.

Because of the lack of Illinois precedent, the Administrator cited cases from other states where attorneys were disciplined for solicitation of a prostitute or false impersonation. The discipline imposed was, in most cases, severe. For example, in Matter of Max Kosher, 62 Washington 2nd, 106 (1963), an attorney was disbarred for aiding and abetting illicit prostitution. In People versus Gritchen, 908 Pacific 2nd 70 (1990), an attorney was suspended for two years and until further order of court after he pled guilty to the misdemeanor offense of soliciting prostitution. In In re Lamb, 776 Pacific 2nd 765 (1989), an attorney was disbarred after sitting for the bar examination for her husband; in In re Croce, 582 New York Sub. 2nd 251 (1992), an attorney was disbarred where he arranged to have another individual take the LSAT for him; and in In re Parker, 938 Pacific 2nd 54 (1992), an applicant to the state bar of Oregon was denied admission when he impersonated his employer during a telephone interview to obtain a credit card. These cases support the Administrator's argument that the Respondent must be severely disciplined.

In In re Chandler, 161 Ill.2d 459 (1994), the Illinois Supreme Court suspended an attorney for three years and until further order of court after she lied to a mortgage lender about her income and employment history, and submitted false W-2 statements, tax returns
and a false employment verification form. She also failed to inform the Character and Fitness Committee about the fraud she committed in obtaining the loan and the lender's ensuing foreclosure sure action. The court stated:

> That the present fraud concerns an attorney's personal life rather than professional affairs is of no moment here. The fraudulent act of an attorney acting in his own behalf in which he seeks personal gain, directly or indirectly to the detriment of honesty, is no less rep- reprehensible than when he acts on behalf of a client. [citation omitted]. It is our duty to supervise the professional conduct of lawyers practicing in Illinois, and the fulfillment of that duty necessarily requires inquiry into the private conduct of attorneys to the extend that such conduct relates to professional competence or the dignity of the legal profession. [citation omitted]. In re Chandler, 641 N.E.2d 473, 480 (1994).

Respondent's misconduct certainly relates to the dignity of the legal profession. Respondent's act of impersonation of a judge vas an assault upon the dignity of not only the legal profession but also the judiciary. It is no less damaging than the lawyer who steals from a client or who neglects to file a timely notice of appeal. It may, in fact, be more damaging to the dignity of lawyers and judges, because it is the kind of misconduct which exacerbates "lawyer bashing" and calls into question the integrity of judges. By holding himself out as a judge and attempting to use that position to avoid an arrest, Respondent fostered a negative perception that judges are crooked. By imposing severe discipline upon Respondent, the Hearing Panel seeks to encourage a better policy: the public should believe that lawyers and judges are not above the law.

The Hearing Panel has considered Respondent's heretofore unblemished legal career, his involvement in the Boy Scouts, the Chicago Bar Association and his other community activities as factors in mitigation of discipline. Respondent's misconduct occurred when he was employed by the AOIC, and this was the principal factor which the Panel considered in aggravation of the discipline.

Date entered: 1-10-97 "s/Michael R Albert

Chair, Michael Albert
For the Hearing Panel

FILED
OCT 16 1997
ATTY REG & DISC COMM
CHICAGO

BEFORE THE REVIEW BOARD
OF THE
ILLINOIS ATTORNEY REGISTRATION
AND DISCIPLINARY COMMISSION

In the matter of:)
JAMES V. MARCANTI,) Commission No. 96 CH 001
Respondent-Appellant,)
No. 1758977)

REPORT AND RECOMMENDATION OF THE REVIEW

BOARD The Administrator filed a one-count complaint against James Marcanti alleging that on July 14, 1995, while employed by the Administrative Office of the Supreme Court of Illinois, Marcanti "approached an undercover police officer, told her he was a judge from Chicago, that he wanted to spend the night with her and inquired whether she could get him some 'dope' ". Marcanti was arrested and charged with solicitation of a sexual act and impersonation of a government official. After the arrest the police uncovered two identification cards from Marcanti's wallet: one card bore the name of a former judge and the other the name "James V.' Marcanti" and the classification "Associate Judge." The complaint further alleged that on October 16, 1995 Marcanti pled guilty to the charges against him and was placed on supervision for one year.

The complaint charged the following misconduct:

> committing criminal acts by engaging in solicitation of a sexual act and impersonation of a government official in violation of Ch. 720 55/11-14.1(a) and 5.32 ILCS that reflect adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects in violation of Rule 8.4 (a)(3) of the Illinois Rules of Professional Conduct;
>
> conduct involving dishonesty, fraud, deceit or misrepresentation in violation of Rule 8.4(a)(4); conduct prejudicial to the administration of justice in violation of Rule 8.4(a) (5); stating or implying an ability to influence improperly any tribunal, legislative body, government agency or official in

violation of Rule 8.4(a)(6);

conduct which tends to defeat the administration of justice or to bring the courts or the legal profession into disrepute in violation of Illinois Supreme Court Rule 771.

At hearing, the Administrator presented her case through documentary evidence and the testimony of four police officers and an attorney who was Marcanti's former supervisor. A psychiatrist was also called to rebut evidence presented by Marcanti.

The first officer to testify was Patricia LaMontagna, the undercover officer who was approached by Marcanti on the night of July 14, 1995. LaMontagna testified that Marcanti told her that he was a judge in Chicago,. that he wanted to have sex all night and he wanted some "dope". LaMontagna responded that her source had dried up and Marcanti said it was "too late to get him out of jail". when Marcanti offered $150 to LaMontagna for the night she hit her pager and a back-up officer, John Thedos, arrived. LaMontagna told Thedos that Marcanti claimed to be a judge and then she went to the van to prepare the arrestee sheet. She did not see Marcanti show any judicial identification.

Officer Thedos confirmed that when LaMontagna hit her alarm button, he went to her assistance and grabbed Marcanti. Marcanti said he was a judge but Thedos did not recall that Marcanti showed any judicial identification. Thedos recalled that Marcanti was handcuffed but did not recall who handcuffed him.

Steve Liboy, an investigator with the sheriff's vice unit, testified that he also responded to LaMontagna's page and told Marcanti he was under arrest. After Marcanti identified himself as a judge and requested to speak to a supervisor, Liboy called Lieutenant Fisher. When Fisher came, Marcanti reached into his pocket and gave an identification card to Fisher. Fisher ordered Marcanti' s arrest. Lieutenant Fisher testified that he was responsible f or the planning and operation of the vice unit. On July 14, 1995, he was called to the scene and was told that Marcanti claimed to be a judicial official. Fisher asked Marcanti for identification and Marcanti produced a judicial card which identified him as Bernard R. Spak, a judge of the Circuit Court of Cook County.

Fisher directed the officers to place Marcanti under arrest and Marcanti was handcuffed and taken to the lock-up. Fisher subsequently learned from the lock-up sergeant that Marcanti was not Bernard Spak. A second identification card identified Marcanti as James Marcanti, Associate Judge.

Nathan Maddox an attorney with the Administrative Office of Illinois Courts (AOIC), testified that he became Marcanti's supervisor in 1993. Marcanti's desire to become a judge was well- known in the office. According to Maddox, Marcanti spent so much time maneuvering to become a judge that his assistant had to carry the load for his division.

Maddox stated that he was informed of Marcanti's arrest on July 16, 1995. On July 17, Maddox met with the Deputy Director and Chief Justice of the Illinois Supreme Court and an agreement was reached that Marcanti would be placed on administrative leave. The next day Marcanti explained to Maddox that he had gone out drinking with a client, the client said something to a woman and the next thing Marcanti knew, they were arrested for solicitation. Marcanti told Maddox that he asked the officers to give him a break because he worked for the Supreme Court. The officers asked him if he was a judge and he answered in the affirmative but later told the officers he was not really a judge. Maddox remembered this conversation with Marcanti because of its sensitive nature and the potential embarrassment to the Supreme Court. Maddox acknowledged that Marcanti did express regret for the situation.

Marcanti testified on his own behalf and presented the testimony of three character witnesses and the clinical social worker who treated him after his arrest. Marcanti stated that he graduated from John Marshall Law School with distinction in 1976. He then earned a masters degree in international law from the University of Amsterdam. After working as an Assistant State's Attorney and engaging in private practice, he accepted a position as a staff attorney with the AOIC in 1986. Although the salary was substantially less than he had earned in private practice, he wanted to get back into public service and also felt that the AOIC would provide a good judicial training ground. His desire to become a judge also led him to move his family to Oak Lawn - where he believed he would have political support - and to change his name on the master roll of attorneys to include his mother's Irish surname. When

he became employed by the AOIC, Marcanti received an employee identification card. In 1990 or 1991 he changed his card by typing in "Associate Judge" under his name. He made the change to give himself a positive mental image. He came into possession of Judge Spak's identification card in mid-1991 when someone sent it to him by mistake. Marcanti stated that he kept both cards in his desk and, until July, 1995, neither card left his office.

On Friday, July 14, 1995 Marcanti received a call from Congressman Lipinski's aide regarding a possible judicial appointment. Marcanti stated that a week earlier he and his sons had been in a car accident and during the week one of his sons had spent 16 hours in the hospital in intensive care. Because of these events, he stated that he did not feel good about the telephone call from Lipinski's office. That same evening Marcanti went home to an empty house because his wife and sons were out of town. He went to bed but then got up and decided to go out for a drink. Marcanti admitted that he had a history of problems with alcohol. In March, 1993 he had enrolled in Alcoholics Anonymous because he had been drinking and using cocaine. He attended AA meetings until February, 1995.

Marcanti testified that after having a few beers, he walked up to a girl, told her he expected to be appointed a judge, asked her to join him in going to a bar, and also asked her to get some dope. He told her he would pay for her time. Marcanti denied making any statement about sex or a specific amount of money. He denied telling the undercover officer that he was a judge.

Marcanti stated that he was arrested and handcuffed with his hands behind his back. An officer pulled the identification card of Bernard Spak out of Marcanti's wallet and asked Marcanti if he was that person. Marcanti responded "yes" or "yes, I'm a judge" in the hope that he could talk his way out of the arrest. After he was taken to the police station, he admitted that he was not a judge. When an investigator asked him for his attorney registration identification, Marcanti gave him his AOIC card.

After the incident Marcanti called a social worker to schedule treatment. He saw Dr. Mazepa for the first time on the Tuesday after the incident and thereafter, he saw Mazepa on a weekly basis from July, 1995 to January, 1997. From January to July, 1996 he saw Mazepa

monthly. At the time of hearing, Marcanti was having occasional meetings with Mazepa.

Marcanti admitted that when he first spoke to his supervisor about the incident, he was not completely truthful. He later admitted to Maddox that he had identified himself as a judge.

In October, 1995, Marcanti pled guilty to two class B misdemeanors and accepted supervision. The conditions of supervision were counseling and attendance at Alcoholic Anonymous meetings. At the time of hearing Marcanti was attending AA meetings three to five times per week.

In January, 1996 Marcanti took a job as a claims examiner with an insurance company. He admitted that he has not told his employer about the disciplinary proceedings.

Marcanti testified to his charitable and community activities. He has coached soccer, been a volunteer reader to blind students, taken a leadership position in boy scouts and has served on various committees and the board of managers for the CBA. In February, 1996 he became the soccer coach for a group of physically and mentally handicapped adults; his team won a gold medal in the Special Olympics.

Three character witnesses attested to Marcanti's reputation for truth and veracity. Judge William Madden of the Circuit Court of Cook County had been the Director of the AOIC when Marcanti was employed by that office. Madden stated that Marcanti was competent and truthful. James Murray, a retired appellate court justice, had served on several committees with Marcanti and commended him for his excellent work. Murray testified that Marcanti's reputation for honesty and integrity was excellent. Madden and Murray each testified that proof of the allegations against Marcanti would not change their opinion of his reputation.

Nicholas Gabb, a scoutmaster who worked with Marcanti on scout activities, stated that Marcanti had a very good reputation for truth and honesty. After his arrest Marcanti met with some scout parents and resigned as assistant scoutmaster. He later renewed his involvement in scouts at the urging of the parents.

Dr. James Mazepa, a clinical social worker in the practice of psychotherapy, testified that he first saw Marcanti on July 18, 1995 and then met with him one or two times a week until January, 1996. A few

"touch-up" meetings have been held since that time. Mazepa diagnosed Marcanti as suffering from a major depressive disorder, alcohol abuse, and dysthymia, a mood disorder manifested by chronic and pervasive sadness and problems with self-esteem. The depressive disorder did not cause the events of July 14 but rather resulted from those events. While Marcanti's dysthymia and alcohol abuse preceded the events of July 14, they provide only an understanding of rather than a cause for the events. In Mazepa's opinion, Marcanti's problems have been resolved and his prognosis is favorable. He believes that Ma=canti's continued attendance at AA meetings would be beneficial.

Dr. Dale Loomis, a physician specializing in psychiatry who examined Marcanti for one hour in July, 1996, was called to rebut the testimony of Dr. Mazepa. Loomis stated that Marcanti's scores on a mental status exam and psychological test fell within a range of normal variation and there was nothing to substantiate any psychiatric diagnosis including major depressive disorder and dysthymia. Loomis noted that Marcanti's history indicated alcohol and substance abuse but there was no causal relationship between the incident and alcohol abuse or dysthymia.

FINDINGS AND CONCLUSIONS

The Hearing Board found that the Administrator proved the charges of the complaint by clear and convincing evidence and recommended that Marcanti be suspended for three years until further order of court. Marcanti challenges the factual findings,

obj ects to the Hearing Board' s rulings on pretrial motions and evidentiary issues, and opposes the recommended discipline.

Before discussing any specific arguments, we believe that two general observations are appropriate. First, we note that many of the objections which Marcanti now raises were not brought to the attention of the Hearing Board. Generally, objections not raised in the trial court are deemed waived and may not be raised for the first time on appeal. E & E Hauling, Inc. v. Pollution Control Bd. (1985), 107 I11.2d 33, 481 N.E.2d 664, 89 Ill.Dec. 821. "The law does not allow parties to lawsuits to sit by and permit allegedly improper. evidence to be introduced without objection and then claim error on appeal.." Lawing v. CTA (1st Dist. 1986), 142 Ill.App.3d 119, 491 N.E.2d 145, 147, 96 Ill.Dec. 331.

Second, in order to establish reversible error, a claimed error must be

substantially prejudicial and thereby unduly influence the outcome of the matter. Schaffner v. Chicago & North Western Transportation Co. (1st Dist 1987), 161 Ill.App.3d 742, 515 N.E.2d 298, 305, 13.3 Ill.Dec. 489, aff'd, 541 N.E.2d 643. As to most of his arguments, Marcanti asserts prejudice but does not specifically demonstrate how a different ruling would have changed or impacted the Hearing Board's findings.

With the foregoing observations in mind, we turn now to the specific arguments raised by Marcanti.

Misconduct alleged in the Complaint

Marcanti claims that the hearing panel erred in allowing the Administrator to present evidence concerning facts not alleged in the complaint. Specifically, he states that police officers were improperly allowed to testify to his solicitation of an undercover police officer and his display of judicial identification.

Regarding solicitation, the complaint does not explicitly state that Marcanti offered the police officer money for an act of sex. The complaint does allege, however, that Marcanti told the officer that he wanted to spend the night with her and that he was arrested for and pled guilty to the charge of solicitation.

We find that the allegations, taken together, sufficiently set forth the act of solicitation. As to Marcanti's claim that the police officers were allowed to testify that he showed an official judicial identification card even though he was not charged with "displaying" judicial identification, any variance between pleadings and proof is not deemed material unless the adverse party can show he was misled by the variance to his prejudice. Tomlinson v. Dartmoor Const. Co. (1st Dist. 1994), 268 Ill.App.3d 677, 645 N.E.2d 376, 206 Ill.Dec. 371. Since Marcanti admitted that he verbally represented himself to be a judge, we fail to see how he was prejudiced by any testimony concerning a display of identification cards. There is no indication that the Hearing Board based its finding of impersonation on his "display" of cards or that the Board would have reached a different result in the absence of that evidence.

Marcanti further states that the complaint should have been dismissed because it did not reasonably inform him of the conduct he had to defend. The Administrator argues that she is not required to plead every fact she intends to introduce into evidence, citing In re Harris (1982), 93

Ill.2d 285, 292, 443 N.E.2d 557, 66 Ill.Dec. 631. We find that the complaint in this matter informed Marcanti that his conduct of July 14, 1995 was the basis for the assertion of professional misconduct. This is not a situation where completely irrelevant misconduct, such as conversion of funds or neglect of client matters, surfaced during the hearing and entered into the Hearing Board's findings. The testimony related to the events which gave rise to Marcanti's arrest and guilty plea, which were adequately set forth in the complaint.

Request to Admit

Marcanti argues that the Administrator went to great lengths to prevent him from discovering in advance the witness' claims concerning his display of judicial identification. As part of his discovery requests, Marcanti filed a Request to Admit which asked, in part, for an admission that "no one claims or alleges that respondent during this incident ever showed or displayed" any type of judicial identification. In response, the Administrator stated that she could not admit or deny the particular request because the information was outside her personal knowledge. Prior to hearing the panel chair sustained the Administrator's objection. Marcanti now claims that the ruling was in error.

We find that the Hearing Board's ruling was not erroneous. The purposes of a request to admit are to expedite litigation, to obviate the difficulty and expense in procuring evidence, and to compel an admission by the adverse party of evidence which is generally of incontrovertible character. People v. Mindham (2d Dist. 1993), 253 Ill.App.3d 792, 625 N.E.2d 835, 839, 192 Ill.Dec. 680. While the Administrator could have responded to a request directed at the claims and allegations made by her own office, a statement that "no one" would make a specific allegation would have been beyond her purview. Marcanti was not without recourse to determine the allegations of witnesses.

> "If the opposing party denies or objects to the existence of the fact, the party serving the demand is put on notice that his adversary has information which conflicts with his and he may wisely proceed with further discovery."

People v. Mindham, supra, 625 N.E.2d at 840. Marcanti could have deposed the witnesses disclosed by the Administrator to determine the

specific facts to which they would testify but he did not do so.

Document Production

In a pre-hearing document request Marcanti asked for "a copy of any statement from any individual whom you intend to call as a witness before the hearing board." The Administrator responded that she had "none other than memorandum of counsel's and commission investigator's conversations with witnesses which are not verbatim statements."

Marcanti now claims that a complaining letter from Lieutenant Fisher to the commission, which letter was admitted into evidence, should have been produced as a witness statement. Factors to consider in reviewing a party's non-compliance with discovery include surprise, prejudice, diligence of the party in seeking discovery and timely objections. Marcano v. CTA (1st Dist. 1974), 22 Ill.App.3ci 427, 318 N.E.25 81, 85.

No objections were raised by Marcanti at the time the document was admitted into evidence. Further, he has not shown that he was surprised or prejudiced by the introduction of the document. He points to minor discrepancies between the written statement and the witness testimony but those discrepancies had no apparent impact on the Hearing Board's ruling. In fact the Board did not rely upon or even mention any particular document in reaching its conclusions. Based on the foregoing, we find that the Administrator's failure to produce the correspondence from Fischer did not prejudice Marcanti's case.

Manifest Weight of the Evidence

Marcanti argues that the Hearing Board's findings were against the manifest weight of the evidence. He states that the testimony of the police officers was not credible because of the inconsistencies in their testimony. Marcanti's focus is on whether he "displayed" judicial identification or whether it was obtained by a search of his wallet.

Marcanti seems to discount the fact that he admitted, both in his answer to the complaint and during his testimony, that he told the officers after his arrest that he was a judge. The criminal statute does not make any distinction between false personation before or after an arrest or between verbal or nonverbal representations.[1] Therefore, given his own

1 Chapter 720 S 5/32-5 of the Illinois criminal statute states, in its entirety, that "a person who falsely represents himself to be an attorney authorized to practice law or a public officer of public employee commits a Class B misdemeanor."

admissions, Marcanti does not explain how a rejection of the witness testimony would impact the finding of the Hearing Board that misconduct occurred.

The inconsistencies which Marcanti characterizes as "clear and deep" were not even mentioned by the Hearing Board. The Board stated that Marcanti told Officers LaMontagna, Thedos and Liboy that he was a judge and that Lieutenant Fisher examined the judicial identification in Marcanti's wallet. Each officer agreed on the basic fact of false impersonation.

The Hearing Board is in the best position to assess the credibility of witnesses and its determinations are accorded great deference on review. In re Timpone (1993), 157 Ill.2d 178, 623 N.E.25 300, 191 Ill.Dec. 55. Having reviewed and compared the testimony of the individual witnesses, we find no reason to disturb the Hearing Board's findings.

We note that Marcanti offers as an exhibit to his brief an affidavit of a fifth officer, Matthew Jones, who states that he was also present at the detention and arrest of Marcanti.

Marcanti has not made a motion to supplement the record with Jones' affidavit nor has he stated why the witness was not offered to the Hearing Board. Since the affidavit is not part of the record in this case an the Administrator had no opportunity to object to its admission as evidence, we decline to consider it. See Suarez v Pierard (3d Dist. 1996), 278 Ill.App.3d 767, 663 N.E.2d 1039, 215 Ill.Dec. 525.

Motion on tn Supplement Record

Marcanti asserts that the Hearing Board erred in denying his motion to supplement the hearing record with the evidence deposition of a character witness, Justice Cunningham who was not available to testify at the hearing. The panel chair denied Marcanti's motion on the basis that another justice was being called to testify and Cunningham's testimony would be cumulative.

The limitation of character evidence is a matter of discretion left to the hearing panel. Commission Rule 273 states, in part, that

> [e]vidence concerning the character or reputation of a respondent or petitioner may be limited by the hearing panel as the interest of justice requires.

Three witnesses testified to Marcanti's good reputation and the

Administrator did not offer any contrary reputation witnesses. Marcanti has not stated how the further testimony of another character witness, which presumably would have been consistent with the other character witnesses, could have impacted the Hearing Board's findings of misconduct or recommendation as to discipline. We therefore do not find that the Hearing Board abused its discretion in limiting the character testimony.

Withdrawal of Character Witness

Marcanti presented a motion to limit disclosure of the identity of any persons who may be members of Alcoholics Anonymous. Marcanti asserts that the Administrator had assured the chair that no questions would be asked by her in this area unless Marcanti first presented such testimony. The panel reserved ruling on the motion.

Marcanti alleges as error that the chair "compelled" the withdrawal of one of his reputation witness and then struck the testimony of the witness. The alleged reason for the withdrawal was the Administrator's questions on cross-examination as to whether the witness was a recovering alcoholic where no testimony on this subject was introduced during the direct examination.

Our review of the. hearing transcript indicates that Marcanti was not "compelled" to withdraw his witness nor did the Administrator's first questions specifically relate to whether the witness was a recovering alcoholic. There is no indication in the record that the Administrator was attempting to embarrass a well recognized attorney or that the witness expressed any discomfort by the questioning. Marcanti notes that the Administrator did not offer to protect the witness by referring to him by his initials but, significantly, Marcanti did not request this accommodation.

Marcanti correctly asserts that "a witness may usually not be cross examined on matters not directly connected to testimony elicited during direct examination." During his direct examination Marcanti's preliminary question to Doe was "[i]n what capacity do you know the respondent?" When the Administrator pursued this line of questioning on cross, the panel chair reasoned that she was just expanding on Marcanti's initial questioning. The chair's observation is in accord with caselaw. See U.S. v. Lewin (7th Cir. 1972), 467 F.2d 1132, 1140

("a witness to reputation may on cross-examination be tested,

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major depressive disorder and dysthymia. As to those conditions, however, Mazepa testified that Marcanti's depression was a result rather than a cause of the July 14 incident and while the dysthymia helped to explain Marcanti's conduct, the condition did not cause his behavior. Thus, even without Loomis' discrediting testimony, the diagnoses of a depressive disorder and dysthymia could not have played a critical factor in the Hearing Board's recommendation.

Unfair Conduct by the Administrator

Marcanti argues that the Administrator acted improperly by threatening to send an investigator to interview his new employer unless he withdrew the name of the Chief Justice of the Supreme Court from his witness list. Marcanti states that, because he felt his job security would be jeopardized if the Administrator carried out her threat, he withdrew the witness' name the next day. He claims that the Chief Justice would have testified concerning his potential judicial appointment.

Marcanti asserts his argument pursuant to Rule 284 which states that matters which are typically the subject of post-trial motions shall be raised before the Review Board. Although arguments concerning attorney misconduct fall within this category, the misconduct has to be evident from the record. Typical examples of misconduct include prejudicial statements made by an attorney during witness examinations or closing arguments. See Bresland v. Ideal Roller & Graphics Co. (1st Dist. 1986), 150 Ill.App.35 445, 501 N.E.2d 830, 103 Ill.Dec. 513.

Marcanti admits that his argument is based on statements made totally outside the record. Consequently, we have no basis for determining the accuracy of his version of the events. Moreover, Marcanti has not demonstrated how the testimony of the Chief Justice, who would not have been called as an occurrence witness or a character witness, would have altered or impacted the Hearing Board's determination. Without proof of the alleged threatening statements or a demonstration of any resulting prejudice to Marcanti's case, we cannot find that the Administrator committed improper conduct.

Marcanti points to additional conduct and statements made by the Administrator during the pre-hearing and hearing process which he claims constitute prejudicial error. Specifically, Marcanti objects to the Administrator's references to his betrayal of the Supreme Court's trust,

to improper elicitation of testimony from one of the undercover police officers concerning the witness' written report of the incident, and to prejudicial questions to Dr. Mazepa concerning Marcanti's statement that "there was a beast in me." We decline to consider these arguments since no objections were raised before the Hearing Board.

Discipline

Having found that the Hearing Board's conclusions are not against the manifest weight of the evidence and that no prejudicial errors were committed, we turn now to the question of the appropriate discipline for the misconduct which occurred. The Administrator states that this is the first instance, in Illinois, of an attorney being disciplined for solicitation of a sexual act.[2] or for impersonation of a judge.

Courts in other states have imposed a range of discipline upon attorneys who have engaged in solicitation of a sexual act. See People v. Gritchen (Colo. 1995), 908 P.2d 70 (two year suspension for attorney who agreed to pay $150 to an undercover police officer posing as a teenager); Richland County Bar Association y Brightbill (1990), 56 Ohio St.3d 95, 564 N.E.2d 471 (county prosecutor publicly reprimanded for impersonating a police officer and soliciting prostitutes; 3 dissenting opinions would have ordered a six month suspension, a one year suspension and an indefinite suspension); In re Buckley (1990), 1 Cal. State Bar Ct. Rptr. 201 (assistant public defender publicly reproved for conviction of soliciting a prostitute).

As to impersonation, the Administrator cited and the Hearing Board relied upon cases in which an attorney was disbarred for taking the bar exam for her husband (In re Lamb (1989), 49 Cal.3d 239, 260 Cal. Rptr. 856, 776 z .2d 765), an attorney was disbarred for having another person take the LSAT exam for him, (In re Croce (1992), 179 A.D.2d 319, 582 N.Y.S.2d 251) and a respondent, who impersonated a state senator in a telephone conversation regarding a credit application, was denied admission to the bar. In re Parker (1992), 314 Or. 143, 838 P.2d 54. In each of the foregoing cases, the attorneys' conduct was the result of calculated efforts to perpetrate a fraud.

Marcanti dismisses the Administrator's cases as involving activities more serious than his own actions. We find, however, that Marcanti's

[2] We note that the Administrator recently agreed to a six month suspension for an attorney who engaged in prostitution. In In re Watt (April 11, 1997) M.R. 13693.

actions, especially with regard to the impersonation, were calculated and involved deceptive acts which occurred over an extended period of time. As early as 1991 Marcanti altered his current employment identification card to falsely state that he was an associate judge. In that same time period he improperly retained the identification card of a retired judge. We can think of no motive, including Marcanti's professed desire for a positive self-image, which could in any way justify or excuse either action. On the contrary, we find that his use of his official position with the AOIC to perpetrate his impersonation is a betrayal of trust which is deeply offensive. His behavior brought disgrace not only to himself, but to the AOIC and to the entire legal profession.

We conclude that the grievous misconduct in this case warrants the substantial suspension recommended hy the Hearing Board. Our determination is not altered by Marcanti's citation to cases in which a judge falsified an award or signed his own release bond. Those cases do not involve impersonation nor were they brought pursuant to the attorney rules of conduct.

Marcanti takes issue with the Hearing Board's statement that he should demonstrate that his alcohol and substance abuse problems have been addressed before he applies for reinstatement. Alcohol problems have been a recognized basis for the imposition of a suspension until further order. See In re Gorman (1970), 46 I11.2d 26, 262 N.E.2d 468; In re O'Connor (May 19, 1994) M.R. 10004; In re Schmieder (Jan. 23, 1996) M.R. 11772.

Marcanti states that his problems with alcohol are being addressed. He admitted, however, that even after his involvement in AA, he had several drinking lapses, including one on the night of July 14. The only evidence of his current reformation is his own testimony concerning his attendance at AA meetings. No corroborating evidence was offered.

As to substance abuse, Marcanti argues that the expert testimony did not support a problem of substance abuse. Dr. Loomis did state, however, that Marcanti's "history" indicates both alcohol and substance abuse. More important, Marcanti admitted during his testimony that he had enrolled in Alcoholics Anonymous in March 1993 because he had been drinking and taking cocaine and further admitted that on the night of July 14, 1995 he asked an undercover

officer to obtain dope for him.

We believe that the evidence raised substantial questions as to whether Marcanti has sufficiently attended to his admitted alcohol and drug use. Without supporting evidence that he is committed to a rehabilitation program, we conclude that his problems suggest a need for establishing his fitness to practice law before future reinstatement.

RECOMMENDATION

Accordingly we concur in the recommendation of the Hearing Board that Respondent-Appellant James V. Marcanti be suspended from the practice of law for three years until further order of court.

Respectfully Submitted,
Robert J. Egan
Martin H. Katz

DATED: 16 October 1997

FILED
OCT 16 1997
ATTY REG & DISC COMM
CHICAGO

I agree with my colleagues' findings but respectfully dissent from the recommendation of a suspension of three years. While I regard the misconduct which occurred as serious in nature, particularly the proven charges of impersonation, I do not view Marcanti's actions in the same vein as the misconduct in other recent cases which have imposed a three year suspension.

In In re Chandler (1994), 161 Ill.2d 459, 641 N.E.2d 473, 204 Ill.Dec. 249 an attorney was suspended for three years until further order or court for lying to a mortgage lender about her income and employment history and submitting false W-2 statements, tax returns, and a false employment verification form. She also failed to inform the Character and Fitness Committee about the fraud she committed in obtaining the loan and the lender's ensuing foreclosure action. Three year suspensions were also imposed in In re Rinella (1997), 175 Ill.25 504, 677 N.E.2d 909, 222 Ill.Dec. 375, where the attorney engaged in sexual relationships with three separate clients and compounded his misconduct by concealing and denying it while it was under investigation and in In Cetwinski (1991), 143 Ill.2d 396, 574 N.E.2d 645, 158 Ill.Dec. 532, where the attorney abetted official corruption and inflated his billings over a period of months, and then gave Federal investigators false statements to cover up his conduct and issued a false press release.

On the scale of sanctionable misconduct where discipline ranges from censure to disbarment, I do not view Marcanti's act of solicitation and one-time attempt to avoid arrest by claiming to be a judge as being on the same level as acts committed with utter and reckless disregard for the welfare of a client or repeated acts of deception committed for the personal gain of an attorney. In my opinion, the scope and harm of Marcanti's misconduct merits a suspension less harsh than that found in the cited cases.

Accordingly, I would recommend a one year suspension from the practice of law. I do, however, agree with my colleagues that the added condition of until further order of court is warranted in this case.

Respectfully Submitted,
Gary V. Johnson

BEFORE THE REVIEW BOARD
OF THE
ATTORNEY TEGISTRATION
AND
DISCIPLINARY COMMISSION

In the Matter of:	)	
	)	
JAMES V. O'SHAUGHNESSY-MARCANTI,		
	)	Commission No. 96 CH 1
Respondent-Appellant,	)	
	)	
No. 1758977.	)	

CERTIFICATION

I, Kenneth G. Jablonski, Clerk of the Attorney Registration and Disciplinary Commission of the Supreme Court of Illinois and keeper of the records, hereby certifies that the foregoing is a true copy of the Report and Recommendation of the Review Board and Dissent in the above entitled cause of record filed in my office on October 16, 1997.

SEAL OF THE SUPREME COURT
STATE OF ILLINOIS
AUG. 26 1818

JULEANN HORNYAK
CLERK OF THE COURT
(217) 782-2035

TELECOMMUNICATIONS DEVICE
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SUPREME COURT OF ILLINOIS
SUPREME COURT BUILDING
SPRINGFIELD 62701
March 12, 1998

Mr. James V. O'Shaughnessy-Marcanti
10345 S. Kilpatrick
Oak Lawn, IL 60435

THE COURT HAS TODAY ENTERED THE FOLLOWING ORDERS IN THE CASE OF:

M.R.14249 - In re: James V. O'Shaughnessy-Marcanti.
Disciplinary Commission.

Motion by James V. O'Shaughnessy-Marcanti for

reconsideration of the order of January 29, 1998, denying his petition for leave to file exceptions to the report and recommendation of the Review Board. Motion denied. Bilandic, J., took no part.

Motion by James V. O'Shaughnessy-Marcanti for reconsideration of the order of January 29, 1998, denying his motion to appoint special investigator. Motion denied. Bilandic, J., took no part.

cc: Ms. Rosalyn B. Kaplan
Ms. Wendy J. Muchman
Kenneth Jablonski, Clerk of Commission

I, Michael Jones, a member of the Office of the Cook County Sheriff's Office, Star Number 226, state as follows:

1. I was present at the detention and arrest of James V. Marcanti of July 14, 1995.

2. I have reviewed the statement of Lieutenant David k. fisher of July 18 and, to the best of my present recollection, it is true and accurate.

3. I do not have a present recollection as to who recovered the "Spak" judicial identification from Mr. Marcanti's wallet.

"s/Officer Michael Jones #226"
Officer Michael Jones
Star No. 226

Joseph P. Mahr, Ltd.
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March 12, 1997

PERSONAL AND CONFIDENTIAL

James V. Marcanti
10345 South Kilpatrick
Oak Lawn, I L 60453

Re: A. R. D. C. Hearing

Dear Mr. Marcanti:
In response to your request to find and interview Sheriff's Police Officer Michael Jones, Star No. 226, I found that in addition to being a Vice Officer with the Cook County Sheriff's Office, he is also the Assistant Pastor of the Bryn Mawr Church at 7000 South Jeffrey in Chicago. There, on Saturday, March 8th, I found the Rev. Jones working in the soup kitchen distributing hot meals to the poor and homeless.
After identifying myself, the Rev. Jones had me accompany him to the Pastor's Office, where we were able to talk in private. After I showed him the letter of Lieutenant now Captain David K. Fisher dated July 19, 1995 to Mr. Jack Kelly of the A.R.D.C., a copy of which is enclosed, Rev. Jones read it in my presence; and he told me that to the best of his knowledge and recollection, the letter of Captain Fisher was true and accurate. I then asked him to look at the statement; and if he found that the three sentences that comprised the statement were true and accurate, to sign it where indicated. After acknowledging edging the accuracy of the statement, the officer signed this in my presence, and returned it to me.
Michael Jones is an intelligent, credible, religious and honorable

man, who would make a good witness in any case.
Please advise if there is anything further you wish me to do relative to this case.

Very truly yours,
"s/Joe Marr"
Joseph P. Mahr

JPM:ce
Encs.

A Service for Trial Lawyers

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Mr. James Marcanti
10345 S. Kilpatrick
Oak Lawn, IL
60453

March 10, 1997

On March 5, 1997. James V. Marcanti, voluntarily submitted himself to a Polygraph examination in this laboratory. The purpose of this exam was to investigate his truthfulness regarding the issues of an arrest of him on July 14, 1995 by Cook County Sheriff Police Deputies.

Prior to his exam, he signed an agreement to take the Polygraph exam and to allow the results and any relevant statements to be reported to Mr. James Marcanti. He also released all parties involved from any liability as it relates to the provisions of this agreement. All executed agreement forms are incorporated as part of our file in this case.

TEST RESULTS

The following listed questions were asked of this subject during his Polygraph exam.

It should be noted that these questions were formulated and suggested as issues of investigation by this writer after reviewing the factual circumstances of Mr. Marcanti's arrest situation.

1. On July 14, 1995, was there an African-American Deputy Sheriff named Mike Jones involved in your arrest? Answer (YES) (Opinion-Truthful)

2. On July 14, 1995, at you arrest site, did you give Lt. Fisher a card stating you were Judge Spak? Answer (NO) (Opinion-Inconclusive)

3. On July 14, 1995, did you tell Deputy Sheriffs Liboy and Thedo that you wanted to talk to their supervisor? Answer (NO) (Opinion-Inconclusive)

4. On July 14, 1995, were you hand cuffed prior to your meet Lt. Fisher? Answer (YES) (Opinion-Truthful)

5. On July 14, 1995, did Deputy Sheriff Mike Jones transport you to the Maywood lock-up? Answer (YES) (Opinion-Truthful)

Respectfully submitted,
"s/Fred L. Hunter"
Fred L. Hunter

SEAL OF THE SUPREME COURT
STATE OF ILLINOIS
APRIL 26, 1818

ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION
of the
SUPREME COURT OF ILLINOIS

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James V. Marcanti
Attorney at Law
10345 S. Kilpatrick
Oak Lawn, IL 60453

Chicago
April 8, 1996

Re: James V. Marcanti

Commission No. 96 CH 1

Dear Mr. Marcanti:
I am in receipt of your April 1 letter. Please be advised that the Administrator's position in this matter has not changed. The recommendation will be disbarment. If you wish to resolve this matter by agreement, we would agree to your filing a name strike

motion. At our meeting, you did request we reevaluate this matter. I indicated that the only way we might reevaluate the recommendation in this matter was upon receipt of Dr. Mazepa's records, if they provided us with certain information. I told you that under those circumstances we might agree to a long suspension with an until further order provision. I also told you I had no authority from the Administrator to agree to anything less than disbarment. In any event, as of this date, we have not yet received an records from Dr. Mazepa. You may wish to check with Dr. Mazepa to determine what is causing the delay in our receipt of his records.

We also discussed, at our meeting that we would not agree to a stipulated hearing. That position has also not changed.

Your letter refers to some affidavits and a report from Dr. Mazepa which you indicate were enclosed. These materials were not included with your correspondence. Please forward those materials. We will not agree, however, that you can submit affidavits in lieu of testimony of witnesses at the hearing of this matter.

With respect to the interrogatories which you propose to file, we will object to the filing of the same. This is not a case where good cause can be shown which would allow an exception to Commission Rule 251. In addition; the interrogatories which you propose to file request improper and privileged information.

Finally, we intend to contact your employer to discuss this matter within the next week.

Please feel free to contact me if you desire any further information.

Very truly yours,
"s/Wendy J. Muchman"

Wendy J. Muchman
Senior Counsel

WJM:jpo
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James V. Marcanti
10345 S. Kilpatrick
Oak Lawn, IL 60453
April 16, 1996

Wendy J. Muchman
ARDC
Suite 1500
139 E. Randolph
Chicago, IL 60601-6219

Dear Ms. Muchman:

This letter follows our conversation of April 15. I withdraw Chief Justice Bilandic from my list of witnesses. Also I will forward Dr. Mazepa's files following my April 23 meeting with him.

Sincerely,

James V. Marcanti

AFFIDAVIT

I, James P. Mazepa, Ph.D. state as follows:

1. I am James V. Marcanti's (hereafter Respondent) treating mental health expert, and I testified at the hearing held last September. I continue to meet with Respondent.

2. I have reviewed the hearing transcript relating to the testimony of Dr. Dale Loomis.

3. I note that Dr. Loomis agrees with my conclusion that, at the time of the hearing, there was no basis to make a mental health diagnosis of the Respondent. (R. 409), (R. 399)

4. I also note that Dr. Loomis does not dispute my professional conclusion that Respondent suffered from a major depressive disorder following his arrest, or the Respondent from dysthymia prior to the night. (R. 406)

5. The doctor also agreed with my conclusion that there is a nexus between the dysthymia and the events during the night of the arrest and Respondent's actions prior to that night. (R. 408)

6. Based on a review of my record for the treatment of Respondent a finding as to alcohol abuse would be appropriate. It would not be appropriate to make a finding as to any other type of substance abuse from these records.

7. Contrary to Dr. Loomis's testimony, it was my statement at the hearing that I did not make a casual connection between the dysthymia and the events alleged in the complaint, because, I felt that in order to do so, I would have to be able to say that all who suffer from dysthymia would have acted in a similar manner as Respondent. (R. 408) It is my continued opinion, which seems to be shared by Dr. Loomis, that Respondent's possession of judicial identification and the changing of his own employment identification

to reflect that he was a judge, when he was not, were actions linked to the dysthymia.

8. Contrary to the testimony of Dr. Loomis, I am professionally qualified to render a diagnosis under DSM-IV. (R. 390)

9. Also contrary to the testimony of Dr. Loomis, there is much in my records for the Respondent outlining treatment for mood disorder and depression. (R. 401)

10. Respondent at my recommendation also saw Dr. Egan, a psychiatrist, for two sessions in October, 1995 when his depression was not progressing. I have no reason to think that Dr. Egan would not verify all of my findings including the conclusion that there is a nexus between the judicial identification matters and the respondent's former condition of dysthmia, as well as the other matters in this Affidavit.

"s/James P. Mazepa Ph.D"
James P. Mazepa